IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5905 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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H A B MIRZA SR VETERNARY OFFI.

Versus

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Appearance:

1. Special Civil Application No. 5905 of 1990

MR KV SHELAT for Petitioner No. 1

MR DEEPAK V PATEL for Respondent No. 1-2

RULE NOT RECD BACK for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 05/04/2002

ORAL JUDGEMENT

#. Heard Mr.K.V.Shelat, learned advocate appearing on behalf of the petitioner and Mr.Deepak V. Patel, learned advocate on behalf of the respondents.

#. In the present petition, the petitioner has challenged the termination order dated 7th June, 1990. this Court has issued RULE on 9th July, 1991 and further ordered to continue interim relief till disposal of this petition. This Court has granted ad-interim relief against vacating the quarter retained by the petitioner. Affidavit-in-reply has been filed by the respondent Nos.1 & 2 and additional affidavit has also been filed by the petitioner, which are on record. Mr.K.V.Shelat, learned advocate appearing on behalf of the petitioner has submitted that petitioner was working as Veterinary officer and appointed by the respondent by order dated 2nd June, 1984 for period of six months on probation. After completion of probation period satisfactorily, the petitioner was confirmed with effect from 11th December, 1984 by order dated 30th May, 1985. Thereafter, the petitioner remained absent for period from 4th September, 1989 to 28th September, 1989. The petitioner was served with show cause notice dated 8th January, 1990 from the General Manager [DNA] and Disciplinary Authority, wherein the period was mentioned that in April, 1989 he remained 3 days on casual leave, in May, 1989 from 12th to 17th. That he remained absent on Leave Without Pay in June, 1989. He remained absent from 20th to 30th on earned leave. In September, 1989 from 3rd to 27th on medical leave. Thus, in all he remained 38 days absent without prior permission of the authority. By virtue of this show cause notice, explanation was called for from the petitioner by the respondent. Reply was submitted by the petitioner on 30th January, 1990 inter alia explaining that he remained absent from 3rd September, 1989 to 27th September, 1989 because of sickness of his mother and in support of the explanation, produced medical certificate of the Doctor and thereafter the Deputy General Manager has accepted the certificate and sanctioned leave of the petitioner. After this reply, he also addressed letter to the Managing Director on 30th March, 1990 and pointed out the facts submitted earlier to the concerned authority. Thereafter, termination order came to be passed on 7th June, 1990 by the Manager. However, Mr.K.V.Shelat, learned advocate for petitioner has submitted that the Manager who has passed the order is not the disciplinary authority and therefore, he has no power and authority to pass such termination order. Mr.Shelat, learned advocate has submitted that the petitioner has not admitted the charge but merely admitted the fact of remaining absent due to sickness of

the mother, therefore, before terminating the services of the petitioner that too after accepting the reply and without holding departmental inquiry which was not at all conducted and hence, the termination order is illegal and contrary to the principles of natural justice. Mr.Shelat, learned advocate has also submitted that after replying to the show cause notice, even no reasonable opportunity of hearing was given to the petitioner and therefore also, on this count, dismissal is illegal and invalid. However, Mr.Shelat, learned advocate alternatively submitted that punishment of termination is too harsh and unjustified as well as disproportionate to the gravity of the misconduct of remaining absent for period of 38 days on account of sickness of mother. Therefore, he submitted that interference by this Court is absolutely called for in the facts and circumstances of this case in the interest of justice.

#. Mr.D.V. Patel, learned advocate appearing on behalf of the respondent authority has submitted that the Manager is duly authorised while approving the dismissal order by the Managing Director who is disciplinary authority. Therefore, the termination order passed by the Manager is just, legal and valid and the Manager was having jurisdiction to pass said termination order. Mr.Patel, learned advocate for the respondent has submitted that the medical certificate which was produced by the petitioner had not tallied the date mentioned in certificate with the leave report which was submitted by the petitioner. However, he submitted that prior permission was not obtained by the petitioner before proceeding on leave. Mr.Patel, learned advocate has also submitted that the past record of the petitioner is not good and therefore, termination order is rightly passed against the petitioner. He also submitted that the petitioner has admitted the charged and therefore, no detailed departmental inquiry is necessary in the matter. Mr.Patel, learned advocate has also submitted that the respondent authority has filed additional affidavit in reply has been filed by the respondent just to show that now the respondent is sick as declared by the BIFR in October, 1994. Therefore, in such situation, he relied on decision of the Division Bench of this Court in case of ABAD DAIRY VS. MANJIBHAI DHANJIBHAI reported in 2000 [3] GLH pg.409, wherein this Court has observed that no employee whose unit has been declared sick, can be directed to regularise substitute or casuals and pay them backwages while considering the claim of regularisation or reinstatement and backwages, financial condition of an industry and its requirement can not be overlooked. Therefore, Mr.Patel has submitted that in such situation

when the respondent Unit is declared to be sick from 1994 as per the BIFR and the proceedings is pending before the BIFR. Mr.D.V.Patel, learned advocate has further submitted that during the interim period, the petitioner gainfully employed and therefore also, he is not entitled backwages in full or part. In support of this contention, he has relied upon pg.42 of this petition, wherein appointment order issued by the company dated 17th October, 1995 where the petitioner was working as General Manager [Marketing]. Therefore, it is contended that since the petitioner was employed with some other company, he was gainfully employed during the interim period.

#. I have considered the submissions of the learned advocates for the parties. Most of the facts are not disputed before this Court between the parties. The petitioner was initially appointed as Senior Veterinary Officer by order dated 2nd June, 1984 for period of six months on probation and subsequently, he was confirmed with effect from 11th September, 1984. Thereafter, he remained absent for period from 4th September, 1989 to 28th September, 1989 because of illness of his mother and he had to go to native place. Thereafter, show cause notice was served on the petitioner on date 8th January, 1990. Said show cause notice has undisputedly issued under the Service Rules under the Model Standing Order Act by the respondent. Explanation was called for and on that basis of the said allegation that as to why disciplinary action should not be taken against the delinquent. It is most pertinent to note that in show cause notice, the respondent has not mentioned that as to why the service of the petitioner should not be terminated. There is vast difference while calling for an explanation on the basis of the misconduct as per the Standing Orders and Services Rules for proposed action that "as to why disciplinary action should not be taken" and "as to why the services of the delinquent should not be terminated". After reply, proper and regular procedure will have to be followed by the respondents. Of course, if the show cause notice is issued by the respondent straightaway calling the explanation from the petitioner that why the services of the petitioner should not be terminated, in that case, termination order after reply can be considered to be proper and legal. In the instant case, obviously when the first show cause notice is not meant for calling an explanation for termination, but the show cause notice was served on the delinquent calling for explanation, as to why disciplinary action should not be taken against the delinquent. Therefore, obviously the show cause notice served on the petitioner

by the respondent, was not meant, nor proposed to the delinquent giving an opportunity to explain the cause before terminating the services. This is undisputed situation in the present case. On the contrary, in response to the show cause notice, reply was submitted by the petitioner on 30th January, 1990. In reply, the delinquent has explained the circumstances that he remained absence for the period mentioned in the show cause notice because of sickness of mother and he also produced medical certificate. This reply and the medical certificate produced by the delinquent in his reply was accepted and the Deputy General Manager has sanctioned the leave of absent period. In reply also, there was no admission of the petitioner, on the contrary, he explained absent period that why he remained absent and cause has been put forward before the respondent authority. Thereafter, straightaway respondent has passed termination order on 7th June, 1990. Therefore, considering all these aspects of the matter, according to my opinion, when the show cause notice has been issued for calling explanation as to why disciplinary action should not be initiated, in that case, the respondent authority cannot be go further beyond the stage other than initiating the disciplinary proceedings against the petitioner. When a show cause notice is served on the delinquent which itself suggests to hold a detailed and regular departmental inquiry as per the Standing Order and Service Rules. But in the case on hands, the respondent authority has bye-passed and grossly overlooked such procedure of holding regular departmental inquiry before terminating service of the petitioner. In reality, the petitioner was not heard personally by any authority and straightaway termination order has been passed. As such, no show cause notice has been given to the petitioner before terminating the service of the petitioner. It is also necessary to note that after receiving reply from the petitioner, the respondent authority has not even cared to reply to the petitioner that your reply is not found satisfactory. No such correspondence is noticed between the petitioner and the respondent authority. Therefore, it is obvious that straightaway termination order has been passed without giving any opportunity of hearing to the petitioner, which in my opinion, clearly seems to have passed in contravention of the Service Rules and Standing Order Act and in clear violation of principles of natural justice and hence, same requires to be quashed and set aside in the interest of justice.

#. It is also pertinent to note one more important aspect of the matter that ultimately the petitioner

remained absent for 38 days due to sickness of mother and his leave was later on sanctioned by the DGM by accepting the medical certificate. However, there seems to be some discrepancy in said certificate but that can be said to be some clerical mistake because leave period suggested "September" but in medical certificate it was shown as "August". But simultaneously, this period tally with the certificate and leave report, therefore, there was some mistake which seemed to have taken into consideration as if the delinquent had tried to misrepresent his case before the respondent authority. This fact was not much material especially once the leave was sanctioned by the Deputy General Manager after considering the said medical certificate which was produced by the petitioner. Therefore, now the question is whether punishment of termination is justified for misconduct of remaining absent of 38 days for genuine cause inasmuch as, said cause was not disputed by the other side and the reason that genuineness of said certificate was not doubted by the respondent.

#. In light of these facts, the view taken by the Apex Court in case of UNION OF INDIA OTHERS V. GIRIRAJ SHARMA reported in AIR 1994 SC 215 that punishment of dismissal for remaining absence for 15 days, the Apex Court has held that such punishment is harsh and unjustified. Relevant observations of the Apex Court in aforesaid case in para-2 require to be referred and same are reproduced as under :-

"2. Mr.Jain the learned counsel for the appellant Union of India contended that the interpretation placed on Section 11[1] of the Central Reserve Police Force Act, 1949 [hereinafter called `the Act'] is not correct and it is on account of this erroneous understanding of the provision that the High Court quashed the order of dismissal. In support of his contention he invited our attention to a decision of the Rajasthan High Court reported in AIR 1965 Raj 140. He also relied on certain other decisions but it is sufficient to state that according to him the learned Judges of the High Court had committed an error in interpreting the said sub section. In our opinion it is not necessary for us to construe sub section [1] of Section 11 of the Act in the backdrop of the facts of the present case. Assuming Mr.Jain is right, we are of the opinion that so far as the present case is concerned the allegation is in regard to the

leave by 12 days. The incumbent while admitting the fact that he had over stayed the period of leave had explained the circumstances in which it was inevitable for him to continue on leave as he was forced to do so on account of unexpected circumstances. We are of the opinion that the punishment of dismissal for over staying the period of 12 days in the said circumstances which have not been controverted in the counter is harsh since the circumstances show that it was not his intention to wilfully flout the order, but the circumstances force him to do so. In that view of the matter the learned counsel for the respondent has fairly conceded that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was not called for. We agree with this submission."

In another decision in case of SYED ZAHEER HUSSAIN V. UNION OF INDIA AND OTHERS reported in 1999 SC Lab & Service pg.666, the Apex Court in decision in para-4 has observed as under :-

"4. In our view, in the facts and circumstances of the case, the punishment of dismissal from service is too harsh and on the contrary, it is required to be substituted by an appropriate lesser punishment. Learned counsel for the respondents after instructions has stated that an appropriate lesser punishment may be awarded by this Court. It will be acceptable to the respondents. In our view, the ends of justice will be served if we set aside the order of dismissal of the appellant and instead direct reinstatement of the appellant in service with continuity and with all other benefits save and except withdrawing 50 percent of backwages from the date of dismissal i.e. 11-10-1998 till today. In our view, this punishment which will involve a substantial monetary loss to the appellant will meet the ends of justice and will be sufficient corrective measure for the appellant. The request of learned counsel for the respondents that two future increments may also be withheld without cumulative effect does not appear to us to be justified on the peculiar facts and circumstances of the case. In our view, the aforesaid monetary loss to the appellant will meet the ends of justice so that

he may be careful in future. It is ordered accordingly. At the request of learned counsel for the respondents, eight weeks' time is granted to the respondents to comply with the present order and to reinstate the appellant with continuity in service and will all other benefits. We make it clear that from today onwards, the appellant will be entitled to full salary. Both the appeals are allowed accordingly. The orders of the Tribunal dated 4-1-11996 and 13-2-1997 are set aside. OA No.714 of 1993 filed by the appellant in the Tribunal shall stand allowed in the aforesaid terms. In the facts and circumstances of the case, there will be no order as to costs."

#. Now the question arise about backwages of interim period or benefits the petitioner is entitled on the basis of the facts that from 1994 onwards, proceeding is pending before the BIFR and the respondent Unit has been declared sick unit. This fact has been pointed out by the respondent in affidavit in reply. The second contention raised by the respondent that the petitioner was gainfully employed in service also requires to be examined by this Court. So far the contention of gainful employment of the petitioner, Mr.K.V.Shelat, learned advocate for petitioner has placed on record the affidavit in rejoinder along with the documents that in a company where the petitioner was employed, the petitioner had already tendered resignation with effect from 1st January, 1996 and therefore, he was appointed for period of six months only from 17th October, 1995 and remained in service upto 1st January, 1996. Except for this period, affidavit has been filed by the petitioner that he remained unemployed and his family is maintained by his Mother-in-law. Mr.Deepak Patel, learned advocate has submitted that the respondent being sick unit, the respondent is not able to pay the legal dues of other employees who have served with the respondent and therefore, in such situation, no order of backwages can be passed against the respondent. Mr.Deepak Patel, learned advocate has also submitted that pursuant to the relief granted by this Court, the petitioner has approached the BIFR and the matter is pending before the BIFR and at present the respondent Unit is already closed and it is not functioning at all since 1999. Mr.Patel, learned advocate has also submitted that pursuant to the ad-interim relief granted by this Court, the petitioner has retained possession of the quarter which was allotted to him from very beginning. So far this contention is

concerned, Mr.Shelat, learned advocate for the petitioner has submitted that the quarter is closed from 1995 but the petitioner will hand over the key of said quarter within period of two weeks from the date of receiving the copy of this order. However, for the contention raised by Mr.Patel on behalf of the respondent in respect of closure of the unit and pendency of the proceedings before the BIFR, this Court is of the opinion, such situation cannot preclude this Court from awarding any relief in accordance with law in favour of the petitioner workman. But, it is obvious that for the relief that may be awarded by this Court in favour of the petitioner, for which the petitioner will have to take appropriate recourse in accordance with law before appropriate authority.

#. So far the aspect of backwages is concerned, considering the submissions of the learned advocates for the parties, it requires to be observed that the petitioner remained without job for about 11 years during the period the matter is pending before this Court for no fault of either side. The respondent unit is public body and State Authority. Therefore, considering overall facts and circumstances, so also overall situation developed subsequently after filing of this petition, the fact cannot be overlooked that the petitioner remained unemployed for long period and has passed through mental agony and hardships for small misconduct to remain absent for 38 days. The petitioner faced termination though the ground of remaining absent was found to be genuine supported by medical certificate. Therefore, considering overall facts and circumstances of the case, so also the fact that the petitioner has rendered five years service, according to my opinion, if 50 % backwages is awarded to the petitioner simultaneous with punishment of stoppage of one increment with cumulative effect for remaining absence without prior permission, will meet the ends of justice.

#. In view of above discussion, the order of termination dated 7th June, 1990 passed by the Manager is hereby quashed and set aside with direction to the respondent authority to reinstate the petitioner in service with continuity of service within period of two months from the date of receipt of copy of this order. It is further directed to the respondents to pay 50 % backwages of interim period to the petitioner and also directed to effect punishment of stoppage of one increment with cumulative effect.

#. In the result, present petition is allowed accordingly. Rule is made absolute accordingly. No order as to costs.

Date : 5-4-2002 [H.K.Rathod, J.]

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